

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

**Dakota Access, LLC
Dakota Access Pipeline Project
Siting Application**

CASE NO. PU-14-842

**APPLICATION TO RESTRICT ACCESS AND KEEP CONFIDENTIAL GIS DATA
SUBMITTED TO THE NORTH DAKOTA PUBLIC SERVICE COMMISSION FOR
THE DAKOTA ACCESS PIPELINE PROJECT**

I. Introduction.

Dakota Access, LLC (“Dakota Access”) moves the North Dakota Public Service Commission (“Commission”) for an order restricting access and keeping confidential geographic information system (“GIS”) data submitted to the North Dakota Public Service Commission for the Dakota Access Pipeline Project (“Project”). While information submitted to the Commission is typically available to the public, there are exceptions and exemptions to this general rule for proprietary information and critical infrastructure. Further, given the safety concerns surrounding the Project, federal regulations are instructive on the issue of restricting access to the GIS information for the safety of Dakota Access representatives and the public.

II. Submission of Information to the Commission and Public Access Generally.

On December 22, 2014, Dakota Access filed with the Commission a Consolidated Application for a Certificate of Corridor Compatibility and Route Permit (“Siting Application”) to authorize the construction of an approximately 358-mile 12-, 20-, 24-, and 30-inch diameter crude oil pipeline and associated facilities in Mountrail, Williams, McKenzie, Dunn, Mercer, Morton, and Emmons Counties, North Dakota and terminals near Stanley in Mountrail County, near Tioga in Williams County, near Epping in Williams County, near Trenton in Williams County, near Watford City in McKenzie County, and near Johnsons Corner in McKenzie County

(the “Project”). *See* PSC Docket No. 1. Pursuant to North Dakota Administrative Code § 69-06-05-01(2)(q), the Siting Application included GIS data “submitted in the ESRI shapefile or geodatabase format.” Since initial submission of the application, Dakota Access has filed various reroutes required for the Project. Following a request for a complete set of updated GIS information from Commission staff, Dakota Access submitted updated GIS information to the Commission.

The general rule that records of a public entity, such as the Commission, are public records is found in the North Dakota Constitution, Art. XI, Sec. 6:

Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

North Dakota Century Code § 44-04-18 restates the constitutional provision in slightly different language: “Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours.” Taken together, Art. XI, Sec. 6 and N.D.C.C. § 44-04-18 provide a default rule that information submitted to the Commission is public record.

III. Limits and Exceptions to Access of Information.

While the state Constitution and state statutes provide that records of a public entity are public records open to inspection, propriety information and information relating to critical infrastructure can remain confidential pursuant to the statutes and administrative rules followed by the Commission. Federal regulations further suggest that GIS information can be kept confidential at the federal level, so similar restrictions should be adopted in this instance.

A. Restrictions on Access to Information in North Dakota.

(1) Security System Plan Exemption.

North Dakota Century Code § 44-04-24 provides for an exemption of certain information relating to security system plans and critical infrastructure. “A security system plan kept by a public entity is exempt from the provisions of section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.” *See* N.D.C.C. § 44-04-24(1). Under this section, “critical infrastructure” is defined as “public buildings, systems, including telecommunications centers and computers, power generation plants, dams, bridges, and similar key resources, whether physical or virtual, so vital to the state that the incapacity or destruction of these systems would have a debilitating impact on security, state economic security, state public health or safety, or any combination of those matters.” N.D.C.C. § 44-04-24(2).

To further clarify what is meant by critical infrastructure, it is helpful to review the list of critical infrastructure sectors established by the Department of Homeland Security. Energy is one of the sixteen areas of critical infrastructure sectors listed by Homeland Security. *See* United States Department of Home Security, *Critical Infrastructure Sectors*, <https://www.dhs.gov/what-critical-infrastructure> (last visited Aug. 31, 2016). With respect to the energy sector, Homeland Security has also listed “Information Sharing and Communication” as a top priority. *See* United States Department of Home Security, *Energy Sector*, <https://www.dhs.gov/energy-sector> (last visited Aug. 31, 2016). With respect to information sharing and communication under the Energy Sector-Specific Plan, Homeland Security has noted the following:

Ensuring timely, reliable, and secure information exchange has been one of the top priorities of the Energy Sector. Both the industry and the government need credible, timely, and actionable threat and risk information to ensure that the most appropriate security investments, programs, and decisions are made to secure sector assets. Information on vulnerabilities, threats, and consequences is, by nature, sensitive. Unless both public and private sector partners trust that shared

information will be strictly protected and used only for agreed-upon purposes, the costs of sharing sensitive information could be seen to outweigh the benefits, and the partnership could fail.

U.S. Department of Homeland Security, *Energy Sector-Specific Plan* 23 (2015), <https://www.dhs.gov/sites/default/files/publications/nipp-ssp-energy-2015-508.pdf>.

When considering the exemption found in N.D.C.C. § 44-04-24 along with the clarifying information provided by the Department of Homeland Security, the Project should be viewed as critical energy infrastructure in the State of North Dakota for the transportation of crude oil. As set forth by the Department of Homeland Security, safety is a primary concern when restricting access to critical infrastructure information. Here, there is no way to ensure that the GIS information provided to the public sector will be used only for lawful purposes, with safety being the main concern of Dakota Access in restricting access to the GIS information. Accordingly, the Commission should restrict access to the critical infrastructure information under N.D.C.C. § 44-04-24, as ensuring safety in this situation greatly outweighs any benefit in providing the information.

(2) Confidentiality of Proprietary Information.

Propriety information is also restricted under § 44-04-18.4 if the information “is of a privileged nature and it has not been previously publicly disclosed.” N.D.C.C. § 44-04-18.4(1). Propriety information includes “[t]echnical . . . records that are received by a public entity, which are owned or controlled by the submitting person, are intended to be and are treated by the submitting person as private, and the disclosure of which would cause harm to the submitting persons business.” *See* N.D.C.C. § 44-04-18.4(2)(c)(5).

While the general route of the Project is a matter of public record and can be accessed by the public, the GIS information submitted to the Commission includes additional information

that Dakota Access keeps private from unauthorized users. As explained in detail below, the Department of Transportation Pipeline and Hazardous Materials Safety Administration (“PHMSA”) restricts access to certain portions of GIS information given the nature of the information and potential safety concerns involved with widely disseminating this information. Given there are no procedures of the Commission in place to limit the information provided to the public, the data would contain information that is generally kept private.

Further, disclosure of the information to the public would cause harm to the business of Dakota Access given the potential for interference with Project construction. The Commission is surely aware of safety concerns Dakota Access has faced during construction to date. The potential for additional interference with construction continues to exist. Accordingly, the Commission should restrict access to the GIS information given the propriety nature of the information and the safety concerns faced by Dakota Access.

B. Restrictions on Access to Information Under Federal Law.

While there are specific provisions of the Commission rules and regulations that would allow for restricted access to GIS information, the limits imposed by PHMSA for restricting access to similar information are instructive under the circumstances. Similar to the open records provisions in North Dakota, under federal law the public has the right to certain information under the Freedom of Information Act (“FOIA”). 5 U.S.C. § 552, *et seq.* FOIA provides that any person has the right to obtain access to federal agency records, except to the extent that portions of those records are protected from public disclosure by one of nine statutory exemptions. Exemptions to the FOIA requirements are found in 5 U.S.C. § 552(b).

PHMSA, the federal agency charged with ensuring the reliable and safe transport of hazardous liquid and gas commodities through pipelines throughout the country, has long

recognized the need for the public to have access to information regarding the location of pipelines in accordance with FOIA. *See* 49 C.F.R. Part 7 (DOT's FOIA regulations); *see also* Claiborne Ashby, *U.S. DOT Provides Secure Access to the Nation's Pipeline Data with GIS*, ARcNews, Fall 2008, <http://www.esri.com/news/arcnews/fall08articles/usdot-provides.html>. However, after the September 11, 2001 terrorist attacks, PHMSA, an agency with broad discretion, determined there was danger in providing the public with full access to data, specifically with respect to the National Pipeline Mapping System ("NPMS"). *See* Ashby, *supra*. Accordingly, PHMSA restricted public access to certain information under the FOIA exemptions and other protections available.

For example, PHMSA has a NPMS Public Map Viewer that is available online that differs from the pipeline system information available to certain entities. *See* National Pipeline Mapping System, <https://www.npms.phmsa.dot.gov> (last visited Aug. 31, 2016). In accordance with PHMSA's security policy, the scale in which the public user may zoom into the mapping system is restricted and the public map viewer must not be used to identify exact locations of pipelines. *See id.* In order to obtain heightened access to information for certain entities, PHMSA developed the Pipeline Information Management Mapping Application ("PIMMA") for use by **pipeline operators and federal, state, and local government officials only**. *See id.* Under PHMSA regulations, government officials or pipeline operators must submit a data request to PHMSA to obtain NPMS data for use in their GIS systems. *See id.*

According to a 2014 NPMS Data Security Presentation, FOIA Exemption 7(F) was cited when data or maps were requested by the media or other "unqualified users." *See* Jack Fox and Amy Nelson, US DOT PHMSA, *National Pipeline Mapping System Data Security*, <https://primis.phmsa.dot.gov/meetings/FilGet.mtg?fil=642>. Full access to GIS and similar

information could reasonably endanger an individual's safety triggering the Exemption 7(F). When courts are faced with determining the proper restriction under Exemption 7(F), courts generally defer to an agency's assessment of harm. *See Garcia v. U.S. Dept. of Justice*, 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002) ("In evaluating the validity of an agency's invocation of Exemption 7(F), the court should 'within limits, defer to the agency's assessment of danger.'"). Given the deference given to agencies when reviewing potential harm, and PHMSA's reading of the exemptions to limit access to information based on safety concerns, the Commission should adopt a similar theory of exemption.

Exemption 3 to the Freedom of Information Act is also instructive, as this section exempts documents specifically excluded by other statutes. *See* 5 U.S.C. 552(b)(3). On the federal level, the Critical Infrastructure Information ("CII") Act of 2002 was enacted to protect private sector infrastructure information voluntarily shared with the government. *See* 6 C.F.R. Part 29. The CII established uniform procedures on the receipt, validation, handling, storage, marking, and use of critical infrastructure information voluntarily submitted to the Department of Homeland Security. *Id.* Critical infrastructure information voluntarily shared with the government and validated as PCII by the Department of Homeland Security is protected from:

- The Freedom of Information Act (FOIA)
- State, local, tribal, and territorial disclosure laws
- Use in regulatory actions
- Use in civil litigation

See id. The CII is instructive to the Commission under the circumstances as to the need for potential oversight of dissemination of information.

In addition, the two North Dakota statutes discussed above would limit access to GIS information and would exclude the production of information at the federal level under Exemption 3. The Commission should adopt similar restrictions under the circumstances.

IV. Conclusion.

Given the safety concerns currently surrounding the Dakota Access Pipeline, Dakota Access respectfully requests the Commission utilize the above exemptions and restrictions to limit providing GIS information to the public. The restrictions utilized by PHMSA clearly evidence the need to restrict certain information to the public. Considering the federal restrictions, the critical infrastructure exemption available under N.D.C.C § 44-04-24, and the confidentiality of proprietary information under N.D.C.C. § 44-04-18.4, it is clear the GIS information submitted to the PSC for the Dakota Access Pipeline should not be widely disseminated to the general public. If additional information is desired as to the security risks posed by providing the GIS information to the public, Dakota Access requests the Commission contact the Federal Bureau of Investigation to discuss safety concerns in providing this information.

Dated this 1st day of September, 2016.

FREDRIKSON & BYRON, P.A.

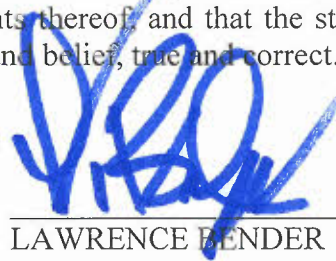
By 

LAWRENCE BENDER, ND Bar #03908
DANIELLE M. KRAUSE, ND Bar #06874
Attorneys for Dakota Access, LLC
1133 College Drive, Suite 1000
Bismarck, ND 58501-1215
(701) 221-8700

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

LAWRENCE BENDER, of lawful age, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for Applicant in the foregoing application; that he executed the foregoing application for and on behalf of said Applicant and as its said attorney that he has read said application and knows the contents thereof, and that the statements made and contained therein are, to the best of his knowledge and belief, true and correct.




LAWRENCE BENDER

Subscribed and sworn to before me this 1st day of September, 2016.



59571276_2.docx



Notary Public
My Commission Expires: